IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 43.

INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

HOBOKEN MANUFACTURERS RAILROAD COMPANY,
Appellee.

REPLY BRIEF FOR RAILROAD APPELLANTS, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

WILLIS T. PIERSON,
THOMAS P. HEALY,
FRANCIS R. CROSS,
JOSEPH F. ESHELMAN,
R. AUBREY BOGLEY,
Counsel for Railroad Appellants.

NOVEMBER 8, 1943.

ALLEN LANE & SCOTT · PRINTERS · PHILADELPHIA

SUBJECT INDEX.

TABLE OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943. No. 43.

Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, et al.,
Appellants,

v.

Hoboken Manufacturers Railroad Company,
Appellee.

REPLY BRIEF FOR RAILROAD APPELLANTS, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

Foreword.

Before proceeding to make specific replies to the several points urged in the brief for appellee, Hoboken Manufacturers Railroad Company, certain general features of the brief may be noted.

To a considerable extent the brief is concerned with matters which were appropriate for Commission consideration and which it actually took into

account, but which are beyond the province of the Court to weigh upon review, since they are the subject of administrative findings by the Commission supported by substantial evidence.

Analysis of the brief for appellee compels the conclusion that the underlying contest, although it was not before the Commission and is not before the Court in this proceeding, is one between Seatrain and the trunk lines as to whether the latter shall be required to contribute to it because they incur no expense for loading or unloading cars of lighterage-free freight when Seatrain uses its devices for loading or unloading railroad freight cars to and from its ships. Of course, such a question cannot be determined in this litigation, since Seatrain is not a party, and the issues do not admit of it.

Appellee's brief also brings into bold relief the fact that the Hoboken itself has nothing to gain by this litigation, but has been used by Seatrain in an attempt to extract payments from the trunk lines under a contract to which they were not a party and as to the terms of which they were not consulted.

The only issue before the Commission was as to the lawfulness of the Hoboken's divisions of the rail rates for the services it performs thereunder, and the only question before the Court is whether the Commission in determining that the existing divisions were reasonable and otherwise lawful acted beyond the scope of its powers or in an arbitrary and unlawful manner.

Reply to Appellee's Basic Proposition.

Appellee's basic proposition has for its major premise the assertion that the trunk-lines have an absolute obligation to unload or load freight moving under rates that include delivery or receipt at ship-side, and that such rates include definite compensation for such unloading or loading of cars. Its minor premise is that the agreement of February 24, 1937, (R. 53) between Seatrain and the Hoboken secures to the latter, and through it to the trunk lines, a "saving" of the expense for loading or unloading freight at the port by reason of Seatrain's undertaking to use its devices for loading and unloading cars onto and from its ships without disturbance of the car lading. The conclusion appellee would draw from these premises is that through an increase in its divisions of the rail-shipside rates it should be put in a position to pay to Seatrain the equivalent or some portion of the value to the trunk lines of the "saving" of the expense of unloading or loading freight when cars are taken upon or discharged from Seatrain's vessels.

The major premise is erroneous in that there is no absolute obligation on the railroads to unload or load all carload freight moving on rail-shipside rates, and in that such rates do not include the sum of 75 cents per ton or any other specific amount to compensate the railroads for unloading or loading such freight.

If there were such an absolute obligation, the service of unloading or loading would have to be actually performed, which is not desired by Seatrain and which would defeat the objective of its method of operation. The record is clear that the only duty of the railroads under shipside rates is to place or receive the freight at the foot of ship's tackle or alongside the vessel. The loading and unloading of freight cars is performed only when such service is necessary in order so to place or receive the freight. Not all carload freight moving under shipside rates is loaded or unloaded at the expense of the railroads. The same New York group rates which apply to and from shipside at Hoboken, N. J., also apply on freight handled at team tracks and private sidings at Hoboken, N. J., and elsewhere in the New York harbor district, where the loading and unloading expense is borne by the shipper or consignee. Moreover, freight moving on shipside rates in open-top equipment, delivered to or received from break-bulk water carriers on marginal tracks on the piers, is unloaded or loaded at the expense of the steamship lines and not at the expense of the railroads (R. 418).

The rail rates which apply to and from the New York harbor area are group rates, and, as stated by the Commission, are based on average conditions (R. 48). As the rates are in fixed amounts regardless of the particular point of delivery or receipt within the group, and as the terminal expense necessarily varies with the varying terminal services required to effect such delivery or receipt, the carriers' margin

between revenues and expenses will differ in each instance. If such delivery or receipt can be accomplished with a minimum of terminal service and expense, the trunk lines are entitled to the greater margin of net revenue. The law casts on them no obligation to turn over to a shipper, a consignor, or a connecting carrier the difference between the margin in such a case and the lesser margin of net revenue where the particular delivery or receipt entails a maximum terminal service. Yet the Hoboken's case rests on the fundamental fallacy that because the railroads, in the case of Seatrain traffic, can accomplish shipside delivery or receipt of freight without unloading or loading the cars, they have an obligation to pay to it, for the ultimate use and benefit of Seatrain, all or part of the additional amount they would have expended if a maximum terminal service had been necessary. Obviously, if the railroads on every shipment moving on the New York group rates were required to perform the maximum terminal service, or expend the equivalent cost where the maximum service was unnecessary, the rates, which are fixed on the basis of average conditions, would be wholly inadequate.

The minor premise of appellee's basic proposition —that it is only by virtue of its agreement with Seatrain that the Hoboken and through it the trunk lines realize a "saving" of the expense for loading or unloading—is likewise without foundation in fact.

If the Hoboken realized from its payments to Seatrain an equivalent or greater "saving" there

would be no reason for it to seek reimbursement from the trunk lines. That it receives nothing under the agreement in the way of benefits which would bear upon the measure of the divisions it should receive out of the shipside rates is conclusively established by the Commission's finding that "the payments which complainant makes to Seatrain cover no part of its transportation service under the lighterage-free rates * * *" (R. 47). As just noted, any lesser expense incurred by the trunk lines in accomplishing a particular delivery or receipt of freight, where a maximum terminal service is unnecessary, is not properly to be considered as a "saving", since there is no obligation upon them to perform a maximum service or to incur a maximum terminal expense in all instances.

But assuming *arguendo* that the trunk lines incur a lesser terminal expense on Seatrain traffic, such "saving" does not derive from the agreement between the Hoboken and Seatrain, but results from the fact that Seatrain for its own purposes receives or delivers the freight in cars without any actual unloading or loading of the freight. This result would follow whether or not there were such an agreement with or payments to Seatrain. The suggestion that Seatrain would not have agreed to interchange cars with its subsidiary, the Hoboken, except pursuant to such a contract, can not avoid the conclusion that wherever Seatrain vessels might dock in New York Harbor, whether at Hoboken, N. J., or elsewhere, no expense for unloading or loading carload freight would fall upon

the railroads when Seatrain received or delivered the cars without the transfer of their lading. The impression obtained from a reading of appellee's brief—that Seatrain was reluctant to interchange cars with the Hoboken and agreed to do so only in consideration of the payments—is unfounded. The whole operation of Seatrain is based upon the physical carriage of cars upon its vessels. As the Commission found:

> "For the purposes of its own, Seatrain prefers to receive and deliver the loaded car" (R. 47).
>
> * * * * * * *
>
> "There is ample reason to conclude, also, that the improved method of transfer is only an incident to the Seatrain plan of transportation, and that this plan has sufficient advantages to impel its use and promotion by Seatrain regardless of any contributory payments from rail connections" (R. 48).

But further than this, the physical interchange of cars was so essential to Seatrain's operation that by means of its wholly-owned subsidiary, the Hoboken, it was enabled to, and actually did, take possession of railroad cars, in most cases without the consent of the owners.*

Since both premises of the Hoboken's basic proposition are groundless, its conclusion—that the trunk lines should put it in funds with which to pay Seatrain all or part of the "saving" of the expense for loading or unloading cars—also falls.

---

* See *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, 330, 337, 338; *Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co.*, 237 I. C. C. 97, 98, and 248 I. C. C. 109; *Pennsylvania R. Co. v. United States* (U. S. D. C. D. of N. J. Civil No. 2092) ... F. S. ... (Oct. 9, 1943).

Corrections of Appellee's Statement of the Case.

Certain inaccuracies in appellee's statement of the fact should here be noted. Others have been noted above or will be covered in the replies to the several points of appellee's argument. Still others are not of importance to the determination of the issues before the Court.

The Case Involves the Division of the Eastern Rail Portions of Joint Rates With Seatrain.

In a footnote to pages 20-21 of appellee's brief it is stated that the division of joint through rates for rail and water transportation to which Seatrain is a party is not involved. Reference to the Record shows this statement to be in error.

The Hoboken's complaint which instituted this proceeding before the Commission put in issue its divisions of all[illegible]s and of primary rail divisions of joint rates wi[illegible]eatrain which were then in effect or which were thereafter to be established. This appears not only from the fact that the complaint named among the defendant railroads numerous Southern and Southwestern rail lines (R. 30-32), which would not have been proper parties if no joint rail-water-rail rates were involved, but also from the specific language of paragraphs 5, 7, 8, and 10 of the complaint (R. 23-26).

At the opening of the hearing, following the Examiner's reading of the issues, counsel for the Hoboken admitted that the subdivision of the rail portion of

certain northbound joint rail-water-rail rates in connection with Seatrain were involved and the Examiner ruled that "all joint rates now in existence are involved." (R. 140). Further, at Record page 149, counsel for the Hoboken stated:

> "Now, as I have already said, but which I have down in my statement, and to make it consecutive, I would like just to repeat—that this proceeding involves the divisions as between Hoboken on the one hand and the trunk lines and their connections on the other, of joint through rates only as applicable to freight delivered to or received from the same lines, whether those rates are published as local or proportional rates to or from Hoboken, or published as joint through rates to which Seatrain also is a party."

The payments by the Hoboken to Seatrain under the agreement of February 24, 1937, (R. 53) were provided for application to all rates or portions of joint rates under which the railroads make shipside delivery. That contract made no such restriction in its scope as appellee now attempts to suggest. Reference to paragraph 9 of that agreement will show that the payment of 73 cents per ton was to be made by the Hoboken "upon each and every ton of such freight interchanged between Railroad and Steamship and transported or to be transported by Railroad under rates which include compensation to Railroad and/or its connections for loading such freight on or unloading such freight from railroad cars * * *." (R. 56). In the opening recital of the agreement (R. 54)

the rates under which the railroads load or unload freight when necessary to the making of shipside delivery are "generally described as import, export, coastwise, intercoastal or lighterage-free * * *". At no time throughout the proceedings has the Hoboken suggested that these payments to Seatrain, which it has sought to recover through increased divisions from the trunk lines, did not apply, or were not to apply, to traffic moving on joint rail-water-rail rates to which Seatrain was a party and under which railroads make shipside delivery.

The fact that the parties for convenience referred to all of such rates and rail divisions of joint rates as "lighterage-free" was not misunderstood by the Commission. Thus, the Commission in describing the freight which the Hoboken interchanged between the trunk lines and Seatrain, comprehended all of it as moving under either lighterage-free or non-lighterage-free rates. It then used this significant differentiation:

> "Under lighterage-free rates the rail carriers undertake to unload freight from the cars and place it within reach of ship's tackle or to receive freight at the foot of ship's tackle and load it into the cars; under non-lighterage-free rates they do not undertake to unload or load the cars." (R. 34).

When after this case had been submitted to the District Court for its decision, the Court, through Judge Fake, inquired of counsel concerning the status of Seatrain's divisions case (I. C. C. No. 28668),*

* The complaint in this case appears in the Record herein at page 643.

counsel for the Hoboken responded with an extended explanation as to why the pendency of the latter case should not prevent a prompt determination by the Court of the instant proceeding. (R. 71-77). In view of the Hoboken's present suggestion that no joint rates with Seatrain are here involved, it should be noted that the letter of its counsel to Judge Fake (R. 73-77) written as late as January 10, 1942, took no such position, but only that the traffic moving under such rates was "a small proportion" of the whole (R. 75).

This present attempt on the part of appellee to narrow the scope of the Commission's decision on the issues presented to and determined by it can be explained only by an evident desire to escape the effect of the Commission's finding that the payments to Seatrain cover no part of the Hoboken service under such rates (R. 47), and to avoid the force of the conclusion that, to the extent of the application of the joint rates prescribed in *Seatrain Lines Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 243 I. C. C. 199, the ground of the instant complaint—the recovery by Seatrain of compensation from the trunk lines for its use of its ship loading devices—is the identical ground on which Seatrain in I. C. C. Docket 28668 is now seeking greater divisions from the eastern railroads covering its water service under such joint rates (R. 643, 648-650).

It is to be noted, however, that the integrity of the Commission's conclusions and the finality of its find-

ings are not limited to, or dependent upon the existence of, joint rates with Seatrain. As to the greater proportion of the traffic which has moved on the separate rail and water rates to and from Hoboken, N. J., there was the same necessity for the Commission, in dividing as between the Hoboken and the trunk lines, to make the determinations which it did. The joint rates with Seatrain are of significance here, not because of the proportion of the traffic to which they are applicable, but because Seatrain's claims in respect of their division so clearly show that the question at the bottom of the instant litigation is a controversy between Seatrain and the trunk lines in which the Hoboken is not really, and should not be, involved.

APPELLEE'S ILLUSTRATIVE RATE IS NOT TYPICAL OF THE AVERAGE SEATRAIN TRAFFIC.

At page 19 of its brief appellee undertakes to illustrate the effect of the Commission's decision by use of an assumed rate of $7.00 per ton. While presumably the Court is not concerned with questions of the fairness of the Commission's apportionment, since they are for its administrative determination, it may be noted in passing that appellee's Exhibit 24 (R. 523, 275) indicates that the average eastern rail rate on Seatrain traffic was $3.91 per ton. For the reasons explained at pages 71-72 of the railroads' main brief, the $7.00 rate should not be assumed by the Court to be typical.

WHETHER THE GENERAL DIVISIONS AGREEMENT BETWEEN THE HOBOKEN AND THE TRUNK LINES COVERED SHIPSIDE RATES ON SEATRAIN TRAFFIC WAS NOT IN ISSUE AND HAS NOT BEEN DETERMINED.

At page 15 of its brief, as upon its complaint before the Commission (R. 25), appellee asserts that the general divisions agreement which has obtained between the Hoboken and the trunk lines was inapplicable to carload traffic interchanged with Seatrain which was not loaded or unloaded. The Hoboken has regarded the divisions agreement as covering such Seatrain traffic as was actually loaded or unloaded at Hoboken, N. J. (R. 25, 45-46), and the restriction of its demand for increased divisions to the rates on lighterage-free traffic implies that the general agreement covers the divisions of non-lighterage-free rates, although such freight is interchanged in the car without loading or unloading of the freight. Since the Hoboken's complaint (R. 22) invoked the Commission's jurisdiction under Section 15(6) of the Interstate Commerce Act (49 U. S. C., Sec. 15(6)) to determine reasonable divisions, the Commission was not concerned with the question, and did not determine, whether the general divisions agreement covered the Seatrain traffic. Whether or not it was previously so covered, the Commission's finding that the Hoboken's divisions were "not unjust, unreasonably low, inequitable, or unduly prejudicial to complainant," and its dismissal of the complaint, would operate to define the divisional rights of the participating carriers

thenceforward. *Alton R. Co.* v. *United States,* 287 U. S. 229, 237. While the Court below found that the agreement had been inapplicable on freight interchanged with Seatrain when the cars were not loaded or unloaded (R. 122), the question was not in issue before it, and no consideration was given to whether the agreement, despite the form in which it was couched (Ex. 2; R. 457, 159), nevertheless covered all the rates participated in by the Hoboken, as well when applied on Seatrain traffic as on other traffic to Hoboken, N. J., or to whether prior resort to the Commission would be necessary to such a determination. See *Great Northern Ry. Co.* v. *Merchants' Elevator Co.,* 259 U. S. 285.

Replies to Appellee's Argument.

REPLY TO POINT I.

A. Under section A of its Point I, appellee argues that appellants' major premise is that the Commission's determination of the point of interchange excused it from considering the reasonableness of the payments to Seatrain and that this premise is unsound. This argument overlooks the fact that the Commission also determined that the payments which the Hoboken makes to Seatrain "cover no part of its transportation service under the lighterage-free rates and are in addition to the full costs of that service" (R. 47), and disregards the further fact that the District Court held that the Commission's finding in this respect is final (R. 116). These appellants rely on this finding as well as upon the one relating to the point of interchange.

and in addition, upon the finding of the Commission that the existing divisions are not unjust, unreasonable, inequitable, or unduly prejudicial (R. 49).

These appellants urge that these several findings of the Commission determine all issues which were before the Commission and that in making such findings the Commission proceeded and acted in accordance with proper legal standards and principles.

B. In section *B* of its Point I, at page 38, appellee argues that although Seatrain's crane and cradle correspond to the booms and tackle of break-bulk vessels the payments are made to Seatrain by the Hoboken "in consideration of the 'benefit' accruing to the Hoboken and *its trunk line connections.*" (Italics inserted). Again at page 41, appellee again refers to the "benefits accruing to the Hoboken and the *trunk line railroads* * * *." (Italics inserted). These references confirm the fact that the underlying controversy, which Seatrain through its subsidiary the Hoboken seeks to have adjudicated in this proceeding, is one as between itself and the trunk lines in which the Hoboken is not a real party in interest, but is a mere pawn for Seatrain.

There is no occasion here to discuss the question whether Seatrain can have a claim against the trunk lines for lessened terminal expense to them when Seatrain employs its devices to load and unload its ships without disturbance of the freight in the car. Similarly there is no occasion here to discuss the question whether, where such a claim is made by Seatrain, as

in I. C. C. Docket No. 28668 now pending, the trunk lines could assert countering claims against Seatrain for the benefits it obtains and the saving of terminal expense which accrues to it by reason of its use of railroad freight cars for the performance of its transportation service by water. The important fact here is that Seatrain is not a party to the proceeding, and that the issues before the Commission are limited solely to the question of the lawfulness of the existing divisions, as between the Hoboken and the trunk lines, of the rail rates and revenues west of the railheads. Accordingly the Commission did not undertake to adjudicate any claim of Seatrain against the trunk lines by reason of the alleged "saving" to them by reason of its use of its ship-loading devices. Within the bounds of the issues before it, it did decide that "the payments which complainant makes to Seatrain cover no part of its transportation service under the lighterage-free rates * * *" (R. 47).

The "fanciful example" given at pages 38-40 of appellee's brief is not parallel to the instant situation. In the illustration Railroad X was a line-haul carrier and specifically agreed to the arrangement. Here the Hoboken is not the line-haul carrier, nor the one to be benefited by any such arrangement, and its agreement made with its parent company does not bind the trunk lines which are the line-haul carriers.

C. Section *C* of Appellee's Point I, at pages 42-44, is an argument predicated upon the assumption that the Commission's finding that the Hoboken's pay-

ments to Seatrain "cover no part of its transportation service" (R. 47), and the Court's holding that such finding is final (R. 116), do not mean what they say. On this point appellee refers to *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, and *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, cited by these appellants, and argue that they "uphold only the finality of a decision by the Commission determining the physical limits of a railroad service covered by its rates." A reference to those decisions will show that they cannot be so limited in their holding and implications. Both involved situations where the line-haul carriers were paying allowances for switching service by the industry which the Commission held to be beyond and in excess of the obligation of the railroads to make delivery under their line-haul rates. The decisions of this Court in sustaining the Commission's orders which required the railroads to discontinue payment of the allowances are here directly in point. The Commission has determined not only the point of interchange and the physical extent of the service comprehended under the rates to be divided, but in addition has specifically held that the payments made by the Hoboken to Seatrain "cover no part of its transportation service under the lighterage-free rates * * *". (R. 47).

The cases of *West Ohio Gas Co.* v. *Comm'n*, 294 U. S. 63, and *Driscoll* v. *Edison Co.*, 307 U. S. 104, 120, which are cited in appellee's brief at page 44, are not pertinent here. They approved the inclusion of ex-

penses for legal services as legitimate expenses to be taken into account in the determination of reasonable rates. But the District Court in the instant case noted that the Commission "held that the payments by Hoboken to Seatrain do not constitute a legitimate transportation cost" and, citing the *Pan American Petroleum case,* held that "upon this finding, supported by evidence, its judgment is final." (R. 116).

D. Under section *D* of its Point I appellee makes several separate arguments to which reply will here be made *seriatim.*

(1) Under subsection (1), at page 45, appellee reiterates, as it does at numerous points in the brief, that the rates involved *include compensation to the trunk lines for loading and unloading.* A sufficient answer to this contention will be found in the brief for these appellants at pages 50-56. But, if anything more were needed it would be found in the clear findings of the Commission among which are the following:

> "* * * it is the duty of the railroads under their tariffs to load and unload freight moving at lighterage-free rates *where such loading or unloading is necessary to the accomplishment of the through transportation,* * * * (R. 46). (Italics inserted).
>
> "The service which the railroads hold themselves out to perform under the lighterage-free rates includes the unloading of inbound cars and the placing of the lading within reach of the ship's tackle and a corresponding but reverse

service in connection with outbound freight. For purposes of its own, Seatrain prefers to receive and deliver the loaded car. The unloading or loading of the car lading and its delivery or receipt at ship's tackle is therefore unnecessary. The rail lines do all that is required when they place the cars in or take them from the Seatrain cradle." (R. 47).

"It is true, as complainant points out, that if the payments which it now makes to Seatrain are not borne by defendant rail lines through a decrease in their divisions and a corresponding increase of complainant's divisions, they will receive an unearned benefit. This comes about from the fact that this new method makes it unnecessary for the rail lines to perform all the service which they hold themselves out to perform under the lighterage-free rates." (R. 48).

"While the result has been to increase the divisions received by defendant rail lines under the lighterage-free rates without change in the service which they perform, this is because some of the service heretofore performed under the lighterage-free rates has become unnecessary." (R. 49).

(2) In subsection (2), at pages 45-46, appellee argues that except for the contract under which the payments are made, it cannot be assumed that Seatrain would have agreed to make its cradle available as an interchange point. It is difficult to see how Seatrain has conceded anything in respect of the interchange point, or how it could have designated an

interchange point which would have involved railroad service *beyond* the cradle, since admittedly the crane and cradle are the equivalent of ship's cargo booms and tackle, and since it is conceded that the railroads have no obligation in respect of the expense of loading cars on the ship. If Seatrain were to designate for interchange purposes a point short of the cradle, it would only increase the expense to be incurred by it in the performance of the terminal service incident to its water transportation. Seatrain does not desire to have the freight unloaded from the cars, and therefore the railroads could readily place cars alongside the Seatrain ships and thereby complete their obligation if Seatrain should prefer that method of delivery. But the fact is that Seatrain desires delivery at the cradle, and in fact the most efficient operation of its ship-loading facilities can only be obtained when the railroads place cars on and take them from the cradle. For these reasons the argument that the Hoboken must pay Seatrain in order to induce the latter to designate the cradle as the point of interchange appears to be far-fetched.

(3) In subsection (3), at page 47, reference is made to certain allowances paid by the railroads to various steamship lines for stevedoring service. As will be apparent from the portions of the Record referred to (R. 177, 423), the allowances were made for the actual performance for the railroads of loading or unloading service rendered under the railroad rates, and were not, as the Commission has found the

Hoboken's payments to Seatrain to be, for a service not performed and above and beyond the rail obligation.

This same comment also applies to what is said in the footnote at page 63 of appellee's brief.

(4) In subsection (4) at page 47 of its brief, appellee refers to "a tariff providing for the payment by the railroad 'of certain shifting allowances' ". The terms of such tariff and the conditions under which it applies are not of record. But whatever its terms, it can not assist appellee's case here. Obviously the railroads have no tariff provision which provides for payments to Seatrain for taking or making delivery of freight in cars or at Hoboken, N. J., rather than elsewhere in New York Harbor. Moreover, Seatrain is not a party to this proceeding, nor is there any issue here as to whether there is any difference in the trunk lines' terminal practices between Seatrain and other water carriers.

(5) Subsection (5) of appellee's brief (p. 48) criticizes the figures used in the brief of the Commission, which would compare the annual payments by the Hoboken to Seatrain with the royalties approximating $50,000 a year, formerly paid by Seatrain for use of the patent covering its method of ship loading and car carriage.* Based on the Hoboken's own evidence, the Commission found that in 1936 it paid

* Although not a matter of record, in the interest of accuracy, it is a fact that U. S. Patent No. 1,591,278, issued July 6, 1926, to Graham M. Brush, covering the Seatrain devices and method of operation and which was assigned by him to Railway Transports, Inc., expired July, 1943.

Seatrain approximately $110,000, and in 1937 approximately $400,000 (R. 39). The decision of the Court below makes reference to the same figures (R. 114). But if it be assumed that these payments were not limited to trunk-line traffic, it is nevertheless significant that appellee does not state what figure the record does support as the approximate annual amount of the payments to Seatrain under the contract involved. Moreover, the Commission's conclusion that they cover no part of the Hoboken's transportation service under the rates to be divided would indicate that, whatever their amount, there was no justification for them.

(6) Subsection (6), at pages 49-52 of appellee's brief, deals with considerations which were for the Commission in determining the questions before it, and which were cited by appellants to show that there was evidence to support its findings. See for example the Brief for Railroad Appellants, pages 68-74. But the Court is not otherwise concerned with them here, since it is not within its province to override the Commission's findings upon an administrative question based upon its own independent weighing of the evidence.* There are some errors, however, in these portions of appellee's brief which may be noted.

In paragraph (*c*) at page 51, it is stated that railroad appellants do not explain their retention of more revenue out of the rates on freight interchanged with Seatrain than on freight interchanged with other

* See cases cited in Brief for Railroad Appellants, pp. 32-33.

steamships "or than remains to them after their terminal operations on freight which they, themselves, lighter to and from shipside."

It is submitted that a complete justification for the difference is set forth at pages 50-60 of the brief of these railroad appellants. Of greater pertinency would be the question as to why the Hoboken, in delivering carload traffic to Seatrain, should receive 75 cents per ton more on the freight moving under lighterage-free rates than on freight moving under non-lighterage-free rates when its service is identical in both instances and it admits the reasonableness of its existing divisions on the non-lighterage-free traffic?

REPLY TO POINT II.

In its Point II (53 ff.) appellee argues that the Commission failed to consider and determine "the value to Hoboken and its trunk line connections of the interchange arrangement with Seatrain" and what would be a reasonable payment to Seatrain to be recovered from the trunk lines by way of divisions.

The Commission considered this question at length. This was what the case was about. The Commission determined that the payments by the Hoboken to Seatrain purchased *nothing* in the way of the actual performance of its transportation service under the rates to be divided. Thus, the Commission found that "the payments which complainant makes to Seatrain cover no part of its transportation service under the

lighterage-free rates * * *" (R. 47). It is apparent from appellee's argument that it seeks to induce the Court to reach a different decision on the facts than made by the Commission in its administrative capacity, which, of course, it is not the function of the Court to do.

The argument of appellee on this point furnishes additional corroboration for the conclusion that the underlying controversy is one as between Seatrain and the trunk lines, and that the contract with the Hoboken is a mere device employed by Seatrain to try to force the trunk lines to incur the same expense for terminal service when interchange is made with it as if loading or unloading of cars were necessary thereto.

A. In section *A* of its Point II (p. 56 ff.) appellee argues that the Commission assumed that its decision as to the point of interchange excused it from determining what compensation the Hoboken might properly pay Seatrain. This argument overlooks the fact that the Commission made a finding not only with respect to the point of interchange, but also the further finding that the payments made by the Hoboken to Seatrain covered no part of its transportation service under the lighterage-free rates. This was a determination that Seatrain under the contract performed no part of the rail transportation service for the Hoboken and that therefore no payment by the Hoboken to Seatrain thereunder could be recovered by it from the trunk lines by way of divisions. This was

a direct determination of the question which appellee argues the Commission failed to consider.

The Hoboken further argues that it is only by virtue of the contract that the cradle is the point of interchange, and that the railroads are thereby enabled to complete their obligation. But aside from the underlying error in assuming that there is an obligation on the railroads to load or unload or to lighter freight when those services are not necessary, the argument is untenable. The railroads complete their obligation without unloading the freight not because the cradle is designated as the point of interchange, but because Seatrain does not desire to have the freight unloaded from the car.

But the Hoboken argues (pp. 54-55) that if the freight were delivered loose, it would be at an expense for loading or unloading the cars, and that therefore when it receives a loaded car from Seatrain the latter "actually fulfills for Hoboken a part of Hoboken's transportation obligation and undertaking", that Seatrain does this "under the terms of the contract", and that it is for these things that the payments to Seatrain are made.

There are several answers to these arguments:

(1) The Commission has specifically found that the payments cover no part of the Hoboken's transportation service, which is to say that it has found that Seatrain under the contract performs no part of the service under the rail rates.

(2) It is not the contract that makes the unloading or loading unnecessary, but the fact that Seatrain, for its own convenience and operating necessities, takes and delivers the cars without unloading the freight.

(3) The Hoboken's argument leads it into absurd positions. Thus, in arguing Seatrain's case—since the case is not really its own, as is apparent from the Commission's finding—the Hoboken suggests (pp. 55-56) that because Seatrain could not have gotten the car aboard at New Orleans or Havana without using its devices, the Hoboken should pay it as for loading the freight into the car at Hoboken, N. J. With respect to the movement in the reverse direction the Hoboken argues that were it not for Seatrain's use of its facilities, an unloading by the Hoboken would be necessary to delivery of the freight to the vessel. These arguments thus lead the Hoboken into the position of contending that Seatrain's use of its facilities at New Orleans, at Havana, and at Hoboken, N. J., are all for the sole benefit of the Hoboken!

But this is not all. At page 58 of its brief, appellee states that it makes payments to Seatrain to induce it to take care of the cars and to pay for them when being used in Seatrain's service. It is indeed strange logic which is used in the attempt to justify a requirement that the trunk lines through the Hoboken should pay to Seatrain approximately $22.55 per car*

*Computed from the average weight per car of 30.9 tons (R. 523) at 73 cents per ton (R. 56).

to induce it to be responsible and to pay for the railroad cars which it uses.*

(4) The fallacy of the argument which the Hoboken here makes for Seatrain can be illustrated by considering the situation where a car is interchanged between two railroads in handling a through joint-line shipment on which is charged the sum of the two separate rates on each railroad. Because the separate rates would also apply on single-line shipments to or from the junction station, and would comprehend the performance of terminal services at origin and destination as well as line-haul service, and since the interchange service between the two railroads would be less onerous and expensive than a full terminal service by each, it could be argued (if appellee's contention were sound) that the first railroad should make a payment to the second since it was saved some terminal expense at the point of interchange. But on the same theory it could likewise be argued that the second railroad should pay

* Since the inauguration of Seatrain's service from Hoboken, N. J., to New Orleans (Belle Chasse), La., via Havana, in October, 1932, a controversy has existed concerning the right of Seatrain to take railroad owned cars for use in its service, and concerning the right of the Hoboken and the New Orleans & Lower Coast railroads to deliver cars to Seatrain for its use, and concerning the terms, conditions, and compensation which should attend upon such use if required. *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328; *Hoboken Mfrs. R. Co. v. Abilene & S. R. Co.*, 237 I. C. C. 97, and 248 I. C. C. 109. The Commission's order in the last decision, which required numerous railroads to cease from prohibiting interchange of their cars with Seatrain and to establish rules for such interchange at the rate of $1.00 per car per day for such period as the cars were in Seatrain's actual possession was set aside in a decision, filed Oct. 9, 1943, by the United States District Court for the District of New Jersey in *The Pennsylvania Railroad Company, et al. v. United States*, Civil No. 2092.

something to the first since it likewise was saved some terminal expense by the interchange of the car.

(5) At pages 56-57 of its brief, appellee cites certain cases which deal with the question of what constitutes a sufficient delivery to a connecting carrier. These cases do not assist its argument. What constitutes delivery of a shipment is a question of fact, and what constitutes delivery by one carrier to a connecting carrier is likewise a question of fact. The Commission as the expert administrative body, acting on substantial evidence, has here determined that fact, and it is not within the province of the Court to set aside its determination in that respect.

(6) Appellee concedes that the Commission may disregard an improvident contract in the fixing of divisions, but argues that the Commission did not here determine that point. But it would be difficult to conceive how the Commission could have made its finding more clear. It flatly held that "the payments which complainant makes to Seatrain cover no part of its transportation service under the lighterage-free rates" (R. 47). In view of the completeness and conclusiveness of this finding, there was no need to label the payment as "improvident". The fact is that the Commission disallowed it altogether, and did not fail to make a finding concerning it as asserted by appellee. This is not a matter on which the Court is entitled to require a different conclusion.

B. In section *B* of its Point II, the appellee argues that the Commission disregarded the payments

on the ground that the contract was between Seatrain and its subsidiary and was therefore not binding upon the Hoboken. This argument erroneously assumes that the Commission's finding concerning the payments was based on Seatrain's control of the Hoboken. If the Hoboken had been entirely independent of Seatrain and had entered into a like contract, the Commission's holding would necessarily have had to have been the same, *i. e.*, that the payments covered no part of its rail transportation. It is to be remembered that the whole case before the Commission was concerned with the legitimacy of these payments, and the report gives every indication of the most careful consideration of the nature of the payments, and the nature of the services of the several carriers involved. The Commission's finding that the payments covered no part of the Hoboken's transportation service was wholly without reference to the question of its control by Seatrain, as an examination of its opinion will confirm.

The supposed example of a contract with Pan-Atlantic Steamship Corporation, at page 60 of appellee's brief, is inapt. Aside from the fact that the text and the footnote appear to proceed upon inconsistent factual situations, the criterion employed by the Commission would disallow payments by the Hoboken to Pan-Atlantic if they did not secure for appellee the actual performance of some portion of the rail transportation service actually rendered as distinguished from merely being made unnecessary.

But, of course, the fact that the Commission's ruling would have necessarily been the same, regardless of the independence or dependence of the Hoboken, does not at all imply that the Hoboken would have made such a contract were it independent of Seatrain. Every consideration points to a contrary conclusion.

(1) Although the Hoboken needed around 60 cents per ton to pay for its switching service, including a fair return, it obligated itself by the contract of February 24, 1937 (R. 53)—which was made after the complaint before the Commission was filed—to pay Seatrain 73 cents per ton on all lighterage-free freight, which resulted in an out-of-pocket loss of 13 cents per ton with nothing left to compensate it for its switching service! And for what did it make this contract? For exactly nothing, as the Commission has found, so far as the performance of any of its rail transportation service under the lighterage-free rates was concerned.

(2) Unless one refuses to regard realities, he must see that the underlying controversy, though not before the Commission or the Court in this case, is one between Seatrain and the trunk lines as to whether they should be required to pay it something because of the fact that they do not incur an expense for loading or unloading cars which are interchanged with it. No such controversy is here, since Seatrain is not a party and the issues do not cover. In any litigation where such an issue was raised, the trunk

lines would have opportunity to show the countering advantages which Seatrain obtains through use of railroad owned cars, etc., etc. But they cannot do so here. Under these circumstances the impression cannot be avoided that Seatrain has used its control over the Hoboken to seek to obtain payments from the trunk lines under conditions where they are powerless to assert their countering claims against it.

(3) Throughout its brief appellee is at great pains to justify its contract with Seatrain, and continually refers to Seatrain's negotiations with the Hoboken's former management as proving that the terms agreed upon were reasonable from the Hoboken's standpoint. Two facts may be considered in this connection. Seatrain acquired control of the Hoboken, April 26, 1932 (R. 33). The first contract with the Hoboken for the payment of allowances to Seatrain was dated November 21, 1932 (R. 50). But this contract is not the one on which the present controversy is founded. Under the 1932 contract Seatrain was obligated to perform a definite part of the Hoboken's rail switching service, but under the contract of February 24, 1937, Seatrain, as the Commission has found, performs none of the Hoboken's rail transportation service. (R. 38, 47).

C. In section *C* of its Point II (pp. 66-68), appellee argues that the Commission was in error in finding (R. 48)—

> "No such payments have, so far as the record shows, been exacted or obtained by Seatrain from an independent rail connection."

To support this charge appellee states (1) that such payments were exacted from the Hoboken when it was independent, (2) that evidence offered, but excluded by the Commission's Examiner, would have shown that Seatrain's original negotiations with New York Harbor lines for a terminal contemplated the making of payments to Seatrain, and (3) that the trunk lines make payments to steamship lines in connection with services performed by the latter in the interchange of freight between them.

Concerning the first point, Seatrain acquired control of the Hoboken April 26, 1932 (R. 33), and its original contract whereby the Hoboken agreed to make payments to it bears date November 21, 1932, or after the Hoboken had ceased to be independent (R. 50). Under this contract, however, Seatrain performed for the Hoboken the actual rail switching service between the hold yard and the cradle (R. 38, 51-52). Under the later contract of ~~November~~ February 24, 1937, which is the contract here particularly involved, Seatrain performs no such service for the payments made by the Hoboken to it in respect of lighterage-free freight. The Commission's finding on this subject (R. 38) is as follows:

> "The original contract entered into November 21, 1932, provided that complainant should pay Seatrain 40 cents per ton on all freight, other than coal, interchanged between them. A part of the consideration for this payment was that Seatrain, as agent for complainant, should move the cars between complainant's hold yard and Seatrain's

car cradle, the agreed point of interchange. This contract was superseded effective March 1, 1937, by a contract, still in effect, which provides that complainant shall pay Seatrain 73 cents per ton on all freight interchanged between them which moves on lighterage-free rates but nothing on freight moving on non-lighterage-free rates. Under this contract Seatrain does not move the cars between complainant's hold yard and the car cradle, all such service being performed by complainant."

As to the second point, it must be obvious that if the tendered evidence of early negotiations with the trunk lines had not been excluded, it would not have assisted appellee's argument here, since Seatrain's location of its terminal on the rails of the Hoboken necessarily connotes a failure of the earlier negotiations with the trunk lines to result in any agreement.

As to the third point, the payments which the trunk lines make to steamship lines, to which appellee refers, are payments for the services of steamship stevedores in performing for the railroads a definite physical portion of the rail transportation service, *i. e.* the loading or unloading of the cars. In the case of Seatrain traffic the cars are not loaded or unloaded. Such payments are, therefore, not parallel to the payments made by the Hoboken to Seatrain, which as the Commission has found cover no part of the Hoboken's transportation service under the lighterage-free rates (R. 47).

But aside from these considerations appellee's point is here without merit. The question for the Court's determination is whether the Commission acted within the scope of its powers and whether its findings are supported by substantial evidence. These appellants submit that the record requires an affirmative answer on these points.

D. In section *D* of its Point II, appellee argues that the Commission was without support in the evidence in finding that "there is ample reason to conclude, also, that the improved method of transfer is only an incident to the Seatrain plan of transportation, and that this plan has sufficient advantages to impel its use and promotion by Seatrain regardless of any contributory payments from rail connections." To support this point appellee reiterates the arguments made under subsection *C*. These arguments have been answered in the immediately preceding portion of this brief and need not be repeated.

That there is evidence to support the Commission's finding in this respect cannot be open to any real question.

The Seatrain method of carrying loaded railroad cars by vessel and of loading and unloading the cars to and from the ship was devised by a steamship operator, Mr. Graham Brush, President of Seatrain. The devices employed relate to water transportation, and have as their principal objective the facilitation of the loading and unloading of the vessels, thus saving time in port, and the better preservation of

the freight by eliminating its handling to and from railroad cars at the steamship terminal (R. 330-332, 372, 386).

It should be borne in mind that the Commission, in disallowing the inclusion of the payments in the Hoboken's divisions did not assume or determine that Seatrain would not attempt to assert some claim against the trunk lines in respect of any advantages which might accrue to them from its use of its ship loading devices. But no such claim could be asserted here, where Seatrain is not a party and where the railroads cannot assert against Seatrain such countering claims as they may have against it, such as for the benefits Seatrain obtains from its use of their cars.*

REPLY TO POINT III.

Appellee's Point III, relating to confiscation, is most illuminating in that it discloses that Seatrain and not the Hoboken has the real interest in the question which has been attempted to be litigated in this proceeding. It further makes clear that the trunk lines, and not the Hoboken, are the other party to the underlying controversy. Thus, at pages 73-74 of its brief appellee states:

> "Under the Commission's decision, Hoboken's expenses could be kept within the division of 60

*On October 9, 1943, in *Pennsylvania R. R. Co. et al. v. United States*, in Civil No. 2092, a three Judge United States District Court for the District of New Jersey set aside the order of the Commission of October 13, 1941, which required the railroads to permit delivery of their cars to Seatrain for use on its route between Hoboken, N. J., and Belle Chasse, La. See *Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co.* 248 I. C. C. 109.

> cents only if it should breach its agreement and cease to make the payments to Seatrain provided for in the contract pursuant to which the interchange is accomplished. *It would then be Seatrain that would be denied compensation.* In either event, the result of the Commission's order would be to transfer to the *trunk lines* without any consideration or compensation from them all of the benefits and savings resulting from the arrangement between Hoboken and Seatrain and from the use, pursuant thereto, of Seatrain's special facilities in making possible an improved method of interchanging freight between a railroad and a water carrier." (Italics inserted).

The District Court made no finding on the question of confiscation (R. 118), and the Hoboken is in no position to raise such a question now. Its argument, however, on this point, by showing that the real interest is that of Seatrain and not that of the Hoboken, confirms the conclusion that the Commission was correct in its determination that the payments which the Hoboken "makes to Seatrain cover no part of its transportation service under the lighterage free rates and are in addition to the full costs of that service." (R. 47).

Concerning appellee's statement that, under the Commission's decision, its expenses could be kept within its revenues only if it should cease to make the payments to Seatrain under the contract, it would seem, in view of the Commission's finding just quoted, that the payments should cease. The situation is some-

what similar in principle to the numerous cases wherein railroads had agreed to pay allowances to shippers for performing switching services at their industrial plants and the Commission subsequently found that the services covered by the allowances were not included in the rail rates. In such instances the allowances were discontinued, and the industries either performed the switching services at their own expense or paid the railroads additional amounts for doing the work. See, for example, *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, 157, and the Interstate Commerce Commission cases there cited.

This implied admission by appellee that its expenses could have been kept within its revenues if it had not make the payments to Seatrain, coupled with the Commission's findings in the report, compels the conviction that Seatrain's dealings with the Hoboken have not been conducted with the sole object of maintaining its solvency. Thus, the agreement of February 24, 1937, provided for the making of payments to Seatrain of 73 cents per ton on all lighterage-free freight, although the Hoboken was receiving but 60 cents per ton for its switching service, and, after making such payment, which exceeded its gross revenue thereon, would have nothing to compensate it for performing its switching service. And these payments were begun long before there was any prospect of a final determination of the divisions question by the Commission, and without any certainty that

the Commission would sustain the inclusion of such payments in the Hoboken's costs which could be recovered from the trunk lines by way of divisions.

But this is not all. As shown by the Commission's decision herein (R. 43), Seatrain about March 1, 1937, made another agreement with the Hoboken whereby the latter's compensation, paid to it by Seatrain for performing certain switching service for Seatrain on its lighterage traffic, was reduced from 40 cents per ton, or an average of $14.55 per car, to $2.50 per car. The Commission's statement in this respect is pointed (R. 43):

> "While it is not intended to find on this record that 40 cents per ton is a reasonable charge for this service, it is believed that in comparison with complainant's other charges and divisions it is more appropriate than the existing charge of $2.50 per car."

Moreover, the Commission further found that about the same time the Hoboken's charge to Seatrain for switching its local carload traffic was substantially reduced (R. 43).

Considering the nature of these various transactions which occurred while the Hoboken was under Seatrain's control, it is not surprising that, as stated at pages 27-28 of appellee's brief, the Hoboken is now involved in reorganization proceedings under Section 77 of the Bankruptcy Act (11 U. S. C. Sec. 205).

Conclusion.

Having shown, as they submit, that the brief of appellee furnishes no valid answer to the points urged in ~~appellee's~~ appellants' main brief against the decree of the District Court, these appellants respectfully submit that the decree of the District Court is in error and should be reversed.

Respectfully submitted,

WILLIS T. PIERSON,
THOMAS P. HEALY,
FRANCIS R. CROSS,
JOSEPH F. ESHELMAN,
R. AUBREY BOGLEY,
Counsel for Railroad Appellants.

NOVEMBER 8, 1943.